This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

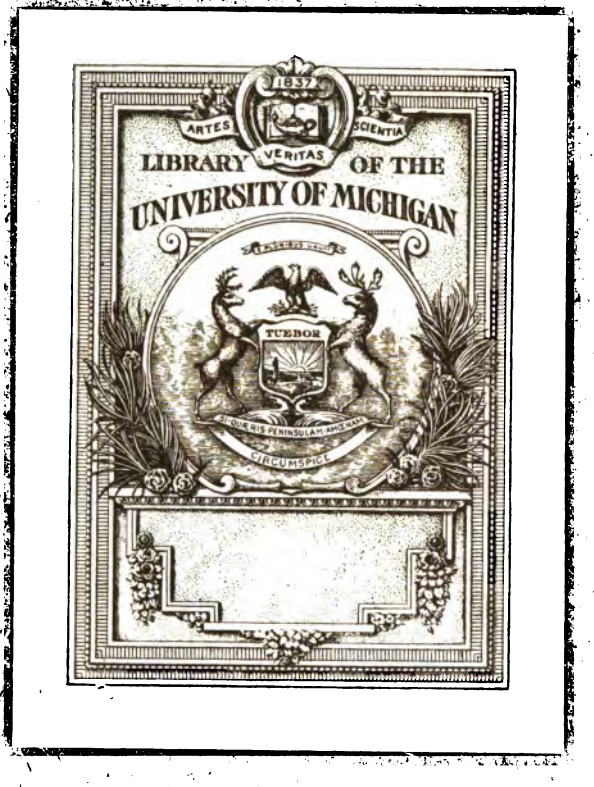
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`


1837
ARTES
VERITAS
SCIENTIA
LIBRARY OF THE
UNIVERSITY OF MICHIGAN
TUEBOR
SIRCUMSPICE

HE
1762
.U51
1908

Property of the United States Government

U.S. INTERSTATE COMMERCE COMMISSION.

UNIV. OF MICH.
MAR 27 1908

MEMORANDUM

TREATING OF

Power of Congress to Authorize the Interstate Commerce Commission to Increase the Percentage of Power or Train Brakes Used on Trains on Railroads Engaged in Interstate Commerce and the American Railway Association to Fix the Standard Height of Drawbars for Freight Cars.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1908.

MEMORANDUM.

Are the provisions of section 5 of the original Safety Appliance Act, referring to the power of the American Railway Association to fix the standard height of drawbars of freight cars, and on its failure to do so, the Interstate Commerce Commission shall so do, and the provision of section 2 of the amendment of 1903, relating to the power of the Interstate Commerce Commission to increase the minimum percentage of power or train braked cars, beyond the power of Congress as being a delegation of legislative and judicial powers?

The term "legislative power" does not include the power given the inspector of factories in Laws 1897, page 222, requiring fire escapes to be constructed on certain buildings and giving the inspector of factories a discretion as to the number, location, material and construction of such escapes, and therefore the statute is not unconstitutional as a delegation of legislative power. (*Arms* v. *Ayer*, 61 N. E., 851; 58 L. R. A., 277.)

In *Wayman* v. *Southard* (10 Wheaton, 43) it was said by Justice Marshall:

> But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself. * * * The seventeenth section of the Judiciary Act and the seventh section of the additional act empower the courts, respectively, to regulate this practice. It certainly will not be contended that this might not be done by Congress. * * *

31649

But the maker of the law may commit something to the discretion of the other departments.

In *Field* v. *Clark* (143 U. S., 692) it is said:

> That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration is not inconsistent with that principle. * * * Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. When the President ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. What the President was required to do was simply in execution of the act of Congress. "The true distinction," as Judge Raney, speaking for the Supreme Court of Ohio, has well said, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made." (*Cin-*

cinnati, Wilmington, etc., R. R. v. *Commissioners*, 1 Ohio State, 88.)

In *Locke's Appeal* (72 Penn., 491, 498) it was said:

> To assert that a law is less than a law because it is made to depend on a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed or to things future and impossible fully to know.

The proper distinction, the court said, was this:

> The legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the lawmaking power and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.

In *Sang Lung et al.* v. *Jackson, Collector* (85 Fed., 505, 506), the court held:

> That the act of March 2, 1897, before referred to, is a valid exercise of the constitutional power of Congress to regulate commerce would seem to admit of no doubt. The power to regulate commerce was defined by Chief Justice Marshall in *Gibbons* v. *Ogden* (9 Wheaton, 196) as the power "to prescribe the rule by which commerce is to be governed." The

late Justice Miller, in speaking of this definition, said: It is one "which perhaps can never be excelled in its brevity, accuracy, and comprehensiveness." (Miller, Const. 449.) The power itself is without any other limitation than that prescribed by the Constitution. In the case of the *County of Mobile* v. *Kimball* (102 U. S., 691), the court, speaking of the power of Congress to regulate commerce, said: "That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several States, and to adopt measures to promote its growth and *insure its safety.*" And in *Gibbons* v. *Ogden, supra*, it is said with greater accuracy: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." These limitations are found in section 9 of Article I of the Constitution, and need not be more particularly referred to, as they do not relate to the present question. * * * The object of the legislation under consideration was to prevent the introduction into the United States of impure and adulterated teas, and, for the purpose of accomplishing this object, Congress provided, first, that the Secretary of the Treasury should, upon the recommendation of a board of skilled experts, establish uniform standards of purity, quality, and fitness for consumption of all teas im-

> ported into the United States; and further, that all teas imported should be first subjected to an examination by an examiner, with the right of appeal from his finding in relation to their purity, quality, and fitness for consumption to a board of general appraisers, appointed by the Secretary of the Treasury. The act further provides that, in making its determination, such board shall have the right to seek the advice of persons skilled in the examination of teas. In providing that the Secretary of the Treasury should establish uniform standards, Congress did not delegate to that officer any of its legislative power. This was simply one of the means devised by Congress for carrying out its expressed will that no impure or adulterated teas should be admitted into the United States, and the power to establish such uniform standards being one calling for the exercise of judgment and discretion in the consideration of facts relating to the qualities of different kinds of teas and the manner of their adulteration was one which might properly be conferred on that officer.

In *Buttfield* v. *Stranahan* (192 U. S., 496) it was said:

> The claim that the statute (Mar. 2, 1897) commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but ex-

> presses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so, because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of *Field* v. *Clark* (*supra*), * * * and that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.

In *Union Bridge Co.* v. *U. S.* (204 U. S., 364), Justice Harlan said:

> It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial, just sense does it confer upon that officer as the head of an Executive Department powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts. It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways of the United States as were caused by bridges maintained over them. That such an object was of common interest and within

the competency of Congress, under its power to regulate commerce, every one must admit; for commerce comprehends navigation, and therefore to free navigation from unreasonable obstructions is a legitimate exertion of that power. (*Gibbons* v. *Ogden*, 9 Wheat., 1, 189, 190.) As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreason-

able obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant contends received our approval, the conclusion could not be avoided that executive officers, in all the departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the foundation of the National Government, exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon Executive Departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power

to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of Government" and bring about confusion, if not paralysis, in the conduct of the public business.

To this may be added the consideration that Congress, by the act of 1899, did not invest the Secretary of War with any power in these matters that could reasonably be characterized as arbitrary. He can not act in reference to any bridge alleged to be an unreasonable obstruction to free navigation without first giving the parties an opportunity to be heard. He can not require any bridge of that character to be altered, even for the purpose of rendering navigation through or under it reasonably free, easy, and unobstructed, without giving previous notice to the persons or corporations owning or controlling the bridge, specifying the changes recommended by the Chief of Engineers, and allowing a reasonable time in which to make them. If, at the end of such time, the required alterations have not been made, then the Secretary is required to bring the matter to the attention of the United States district attorney in order that criminal proceedings may be instituted to enforce the act of Congress. In the present case all the provisions of the statute were complied with. The parties concerned were duly notified and were fully heard. Nor is there any reason to say that the Secretary of War was not entirely justified, if not compelled, by the evidence in finding that the bridge in question was an unreasonable ob-

> struction to commerce and navigation as now conducted.
>
> We are of opinion that the act in question is not unconstitutional as conferring upon the Secretary of War powers of such nature that they could not be delegated to him by Congress.

The question under consideration certainly comes within the rule asserted in the opinions just quoted.

The manifest purpose of the act is "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." The legislative power was exercised when the statute was enacted. The powers given the American Railway Association and the Interstate Commerce Commission are not powers to make laws to bring about the desired remedy or to interpret the law as it now stands, but they are merely ministerial acts which involve a discretion as to its execution and are to be exercised under and in pursuance of the law. Certainly Congress had the power to determine what the standard height of drawbars should be and also to determine the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as declared in the statute. But it was the aim of Congress to have this determined in a way and by a board versed in the knowledge of the operation of cars, trains, etc.,